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18 CALIFORNIANS FOR
19 ALTERNATIVES TO TOXICS

20
21 **UNITED STATES DISTRICT COURT**
22 **NORTHERN DISTRICT OF CALIFORNIA**

23 CALIFORNIANS FOR
24 ALTERNATIVES TO TOXICS,

25 Plaintiff,

26 vs.

27 KERNEN CONSTRUCTION CO.,
28 BEDROCK INVESTMENTS LLC,
SCOTT FARLEY, and KURT KERNEN,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND CIVIL
PENALTIES**

**(Federal Water Pollution Control Act, 33
U.S.C. §§ 1251–1387)**

22
23 CALIFORNIANS FOR ALTERNATIVES TO TOXICS (“CATs”), by and through
24 its counsel, hereby alleges:

25 **I. JURISDICTION AND VENUE**

26 1. This is a civil suit brought under the citizen suit enforcement provision of the
27 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (the “Clean Water Act”, the
28 “CWA” or “the Act”) against Kernen Construction Co., Bedrock Investments LLC, Scott

1 Farley, and Kurt Kernen (“Defendants”). This Court has subject matter jurisdiction over the
 2 parties and the subject matter of this action pursuant to Section 505(a)(1) of the Act, 33
 3 U.S.C. § 1365(a), and 28 U.S.C. § 1331 (an action arising under the laws of the United
 4 States). Specifically, this action arises under Section 505(a)(1)(A) of the Act, 33 U.S.C. §
 5 1365(a)(1)(A) (citizen suit to enforce effluent standard or limitation). The relief requested is
 6 authorized pursuant to 33 U.S.C. §1365(a) (injunctive relief), 33 U.S.C. §§ 1365(a), 1319(d)
 7 (civil penalties), and 28 U.S.C. §§ 2201–2202 (power to issue declaratory relief in case of
 8 actual controversy and further necessary relief based on such a declaration).

9 2. On or about May 13, 2016, Plaintiff provided written notice to Defendants, via
 10 certified mail, of Defendants’ violations of the Act (“CWA Notice Letter”), and of their
 11 intention to file suit against Defendants, as required by the Act. *See* 33 U.S.C. §
 12 1365(b)(1)(A); 40 C.F.R. § 135.2(a)(1) (1991). Plaintiff mailed a copy of the CWA Notice
 13 Letter to the Administrator of the United States Environmental Protection Agency (“EPA”);
 14 the Administrator of EPA Region IX; the Executive Director of the State Water Resources
 15 Control Board (“State Board”); and the Executive Officer of the Regional Water Quality
 16 Control Board, Central Valley Region (“Regional Board”), pursuant to 40 C.F.R.
 17 § 135.2(a)(1) (1991). A true and correct copy of CATs’ CWA Notice Letter is attached
 18 hereto as Exhibit A, and is incorporated by reference.

19 3. More than sixty days have passed since Plaintiff served this CWA Notice
 20 Letter on Defendants and the agencies. Plaintiff is informed and believes, and thereupon
 21 alleges, that neither the EPA nor the State of California has commenced or is diligently
 22 prosecuting a court action to redress the violations alleged in this Complaint. This action’s
 23 claims for civil penalties are not barred by any prior administrative penalty under Section
 24 309(g) of the Act, 33 U.S.C. § 1319(g).

25 4. Venue is proper in the Northern District of California pursuant to Section
 26 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the sources of the violations are
 27 located within this District. Venue is also proper under 28 U.S.C. § 1391(b) because
 28 Defendants reside in this District and a substantial part of the events or omissions giving rise

1 to Plaintiff's claims occurred in this District. Intra-district venue is proper in San Francisco,
2 California, because the sources of the violations are located within Humboldt County,
3 California.

4 **II. INTRODUCTION**

5 5. This Complaint seeks relief for Defendants' violations of the CWA at the
6 approximately 37-acre facility owned and/or operated by Defendants (the "Facility"). The
7 Facility is located at 2350 Glendale Drive, in McKinleyville, California. Defendants
8 discharge pollutant-contaminated storm water from the Facility into Hall Creek which drains
9 into Mad River. Defendants are violating both the substantive and procedural requirements
10 of the CWA.

11 6. Defendants' discharges of pollutant-contaminated storm water from the
12 Facility violate the Act and the State of California's General Industrial Permit for storm
13 water discharges, State Water Resources Control Board ("State Board") Water Quality Order
14 No. 91-13-DWQ, as amended by Water Quality Order No. 92-12-DWQ, Water Quality
15 Order No. 97-03-DWQ, and Water Quality Order No. 2014-0057-DWQ, National Pollutant
16 Discharge Elimination System ("NPDES") General Permit No. CAS000001 (hereinafter
17 "General Permit" or "Permit"). Defendants' violations of the filing, monitoring, reporting,
18 discharge and management practice requirements, and other procedural and substantive
19 requirements of the General Permit and the Act are ongoing and continuous.

20 7. The failure on the part of industrial facility operators such as Defendants to
21 comply with the General Permit is recognized as a significant cause of the continuing decline
22 in water quality of receiving waters, such as Hall Creek and Mad River. The general
23 consensus among regulatory agencies and water quality specialists is that storm water
24 pollution amounts to more than half the total pollution entering the marine environment each
25 year.

26 **III. PARTIES**

27 8. CATs is a non-profit public benefit corporation organized under the laws of
28 California, based in Arcata, California. CATs is dedicated to the defense of the environment

1 from the effects of toxic chemicals, and the preservation and protection of the wildlife and
2 natural resources of California waters, including the waters into which Defendants discharge
3 polluted storm water. To further its goals, CATs actively seeks federal and state agency
4 implementation of state and federal water quality laws, including the CWA, and as
5 necessary, directly initiates enforcement actions on behalf of itself and its members.

6 9. Members of CATs, including citizens, taxpayers, property owners, and
7 residents, live, work, travel and recreate on and near Hall Creek and Mad River, into which
8 Defendants cause pollutants to be discharged. These CATs members use and enjoy the
9 impacted waters for cultural, recreational, educational, scientific, conservation, aesthetic and
10 spiritual purposes. Defendants' discharge of storm water containing pollutants impairs each
11 of those uses. Thus, the interests of CATs' members have been, are being, and will continue
12 to be adversely affected by Defendants' failure to comply with the Clean Water Act and the
13 General Permit.

14 10. Members of CATs reside in California and use and enjoy California's
15 numerous rivers for recreation and other activities. Members of CATs use and enjoy the
16 waters of Hall Creek and Mad River, into which Defendants have caused, are causing, and
17 will continue to cause, pollutants to be discharged. Members of CATs use these areas to
18 fish, boat, kayak, swim, bird watch, view wildlife, and engage in scientific study, including
19 monitoring activities, among other things. Defendants' discharges of pollutants threaten or
20 impair each of those uses or contribute to such threats and impairments. Thus, the interests
21 of CATs' members have been, are being, and will continue to be adversely affected by
22 Defendants' ongoing failure to comply with the Clean Water Act. The relief sought herein
23 will redress the harms to Plaintiff caused by Defendants' activities.

24 11. Continuing commission of the acts and omissions alleged above will
25 irreparably harm Plaintiff and the citizens of the State of California, for which harm they have
26 no plain, speedy or adequate remedy at law.

27 12. Plaintiff is informed and believes, and thereupon alleges that Defendants own
28 and/or operate the Facility.

1 **IV. LEGAL BACKGROUND**

2 **A. Clean Water Act**

3 13. Congress enacted the CWA to “restore and maintain the chemical, physical,
 4 and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA establishes
 5 an “interim goal of water quality which provides for the protection and propagation of fish,
 6 shellfish, and wildlife and provides for recreation in and on the water . . .” 33 U.S.C. §
 7 1251(a)(2). To these ends, Congress developed both a water quality-based and technology-
 8 based approach to regulating discharges of pollutants from point sources into waters of the
 9 United States.

10 14. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any
 11 pollutant from a point source into waters of the United States, unless such discharge is in
 12 compliance with various enumerated sections of the Act. Among other things, Section
 13 301(a) prohibits discharges not authorized by, or in violation of, the terms of an NPDES
 14 permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

15 15. The term “discharge of pollutants” means “any addition of any pollutant to
 16 navigable waters from any point source.” 33 U.S.C. § 1362(12). Pollutants are defined to
 17 include, among other examples, industrial waste, chemical wastes, biological materials, heat,
 18 rock, and sand discharged into water. 33 U.S.C. § 1362(6).

19 16. A “point source” is defined as “any discernible, confined and discrete
 20 conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . .
 21 from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

22 17. “Navigable waters” means “the waters of the United States.” 33 U.S.C.
 23 § 1362(7). Waters of the United States includes, among others things, waters that are, were,
 24 or are susceptible to use in interstate commerce, and tributaries to such waters. 40 C.F.R. §
 25 230.3 (2015).

26 18. Section 402(p) of the Act establishes a framework for regulating municipal
 27 and industrial storm water discharges under the NPDES program, 33 U.S.C. § 1342(p), and,
 28 specifically, requires an NPDES permit for storm water discharges associated with industrial

1 activity. *Id.* § 1342(p)(2)(B).

2 19. Section 505(a)(1) provides for citizen enforcement actions against any
 3 “person,” including individuals, corporations, or partnerships, 33 U.S.C. § 1362(5), for
 4 violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33
 5 U.S.C. §1365(a)(1) (authorizing actions against any person alleged to be in violation of an
 6 effluent standard or limitation); *id.* § 1365(f) (defining “effluent limitation” broadly to
 7 include “a permit or condition thereof issued under [section 402] of this title,” and “any
 8 unlawful act under subsection (a) of [section 301] of this title”).

9 20. An action for injunctive relief under the Act is authorized by 33 U.S.C. §
 10 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to
 11 \$37,500 per day for violations occurring after January 12, 2009, pursuant to Sections 309(d)
 12 and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365, and 40 C.F.R. §§ 19.1–19.4 (2008).

13 **B. State Regulations**

14 21. Mad River is degraded from pollutant loading. This is officially recognized
 15 by the EPA, the State Board and the Regional Board, which have place the river on the
 16 CWA section 303(d) list of waters that are so polluted that they do not meet applicable water
 17 quality standards. The Regional Board's Water Quality Control Plan for the North Coast
 18 Basin (hereafter referred to as the “Basin Plan”) is the master policy document setting forth
 19 the legal, technical, and programmatic bases of water quality regulation in the Region.
 20 Among other things, the Basin Plan includes the water quality objectives needed to protect
 21 the designated beneficial water uses. The Basin Plan sets forth narrative water quality
 22 objectives for sediment, settleable and suspended materials, as well as narrative objectives
 23 for preventing the impairment of water quality with oil sheens, turbidity, or other nuisance
 24 conditions. The Basin Plan also includes numeric water quality standards for pH, dissolved
 25 oxygen and toxic pollutants as well as site specific objectives for certain pollutants of
 26 concern such as lead, copper, zinc and aluminum.

27 22. In addition, a rule promulgated by EPA known as the California Toxics Rule
 28 (“CTR”), discussed further below, sets Water Quality Standards (“WQS”) for 126 toxic

1 priority pollutants in California's rivers, lakes, enclosed bays, and estuaries. The CTR
 2 applies to Hall Creek and Mad River, and includes limits for several toxic metals, including
 3 lead, copper and zinc.

4 **C. California's General Industrial Storm Water Permit**

5 23. Section 402 authorizes states with approved NPDES permit programs to
 6 regulate industrial storm water discharges through individual permits issued to dischargers
 7 and/or through the issuance of a single, statewide general permit applicable to all industrial
 8 storm water dischargers. 33 U.S.C. § 1342(b).

9 24. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, the Administrator of
 10 EPA has authorized California's State Board to issue NPDES permits including general
 11 NPDES permits in California.

12 25. The State Board elected to issue a statewide general permit for industrial
 13 discharges. The State Board issued the General Permit on or about November 19, 1991,
 14 modified the General Permit on or about September 17, 1992, and reissued the General
 15 Permit on April 17, 1997 and again on April 1, 2014 (effective July 1, 2015), pursuant to
 16 Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

17 26. Facilities discharging, or having the potential to discharge, storm water
 18 associated with industrial activity that have not obtained an individual NPDES permit must
 19 apply for coverage under the State's General Permit by filing a Notice of Intent ("NOI").
 20 The General Permit requires facilities to file their NOIs before the initiation of industrial
 21 operations.

22 27. Once regulated by an NPDES permit, facilities must strictly comply with all
 23 of the terms and conditions of that permit. A violation of the General Permit is a violation of
 24 the Act. *See* General Permit, Section XXI.A.

25 28. In order to discharge storm water lawfully in California, industrial
 26 dischargers must comply with the terms of the General Permit or have obtained and
 27 complied with an individual NPDES permit.

28 29. The General Permit contains three primary and interrelated categories of
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1 requirements: 1) discharge prohibitions; 2) Storm Water Pollution Prevention Plan
 2 (“SWPPP”) requirements; and 3) monitoring and reporting requirements, including the
 3 requirement to prepare an annual report.

4 30. Discharge Prohibition III.B of the General Permit prohibits the direct or
 5 indirect discharge of materials other than storm water (“non-storm water discharges”), which
 6 are not otherwise regulated by an NPDES permit, to the waters of the United States.
 7 Discharge Prohibition III.C of the General Permit prohibits storm water discharges and
 8 authorized non-storm water discharges that cause or threaten to cause pollution,
 9 contamination or nuisance as defined in section 13050 of the California Water Code.
 10 Receiving Water Limitation VI.A of the General Permit prohibits storm water discharges
 11 that cause or contribute to an exceedance of any applicable water quality standards in any
 12 affected receiving water. Receiving Water Limitation VI.B of the General Permit prohibits
 13 storm water discharges to any surface or ground water that adversely impact human health or
 14 the environment.

15 31. Effluent Limitation V.A of the General Permit requires dischargers to reduce
 16 or prevent pollutants in their storm water discharges through implementation of the Best
 17 Available Technology Economically Achievable (“BAT”) for toxic and nonconventional
 18 pollutants and the Best Conventional Pollutant Control Technology (“BCT”) for
 19 conventional pollutants.

20 32. EPA has established Benchmark Levels as guidelines for determining
 21 whether a facility discharging industrial storm water has implemented the requisite BAT and
 22 BCT standards. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000). The following benchmarks
 23 have been established for pollutants discharged by Defendants: Total Suspended Solids –
 24 100 mg/L; Oil & Grease – 15 mg/L; Zinc – 0.117 mg/L; Chemical Oxygen Demand – 120
 25 mg/L; Iron – 1.00 mg/L; Copper – 0.0048 mg/L; and, Aluminum – 0.75 mg/L.

26 33. The Regional Board has established water quality standards for Mad River in
 27 the Basin Plan.

28 34. The Basin Plan includes a toxicity standard which states that “[a]ll waters
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1 shall be maintained free of toxic substances in concentrations which are toxic to or which
 2 produce detrimental physiological responses in, human, plant, animal, or aquatic life.” III-
 3 8.01, Basin Plan.

4 35. The Basin Plan provides that “[w]aters shall not contain concentrations of
 5 chemical constituents known to be deleterious to fish or wildlife.” III-3.00 Basin Plan.

6 36. The Basin Plan provides that “[a]t a minimum, water designated for use as
 7 domestic or municipal supply (MUN) shall not contain concentrations of chemical
 8 constituents in excess of the maximum contaminant levels (MCLs).” *Id.*

9 37. EPA issued the CTR in 2000, establishing numeric receiving water limits for
 10 certain toxic pollutants in California surface waters. 40 C.F.R. § 131.38 (2013). The CTR
 11 establishes the following applicable numeric limit for freshwater surface waters: zinc – 0.12
 12 mg/L (maximum concentration), subject to water hardness.

13 38. The General Permit requires dischargers to develop and implement a site-
 14 specific SWPPP. General Permit, Section X.A. The SWPPP must include, among other
 15 elements: (1) the facility name and contact information; (2) a site map; (3) a list of industrial
 16 materials; (4) a description of potential pollution sources; (5) an assessment of potential
 17 pollutant sources; (6) minimum BMPs; (7) advanced BMPs, if applicable; (8) a monitoring
 18 implementation plan; (9) an annual comprehensive facility compliance evaluation; and (10)
 19 the date that the SWPPP was initially prepared and the date of each SWPPP amendment, if
 20 applicable.

21 39. Dischargers must revise their SWPPP whenever necessary and certify and
 22 submit via the Regional Board’s Storm Water Multiple Application and Report Tracking
 23 System (“SMARTS”) their SWPPP within 30 days whenever the SWPPP contains
 24 significant revisions(s); and, certify and submit via SMARTS their SWPPP not more than
 25 once every three (3) months in the reporting year for any non-significant revisions. General
 26 Permit, Section X.B.

27 40. Dischargers must implement the minimum BMPs identified in Section
 28 X.H.1. of the General Permit. In addition to the minimum BMPs identified in Section

1 X.H.1, advanced BMPs must be implemented if necessary to reduce or prevent discharges of
 2 pollutants in storm water dischargers in a manner that reflects best industry practice.
 3 General Permit, Section X.H.2.

4 41. Special Conditions Section XX.B of the General Permit require a discharger
 5 to prepare and submit documentation to the Regional Board upon determination that storm
 6 water discharges are in violation of Receiving Water Limitations, Section VI. The
 7 documentation must describe changes the discharger will make to its current BMPs in order
 8 to prevent or reduce any pollutant in its storm water discharges that is causing or
 9 contributing to an exceedance of water quality standards. General Permit, Section XX.B.

10 42. Section XV of the General Permit requires an annual evaluation of storm
 11 water controls including the preparation of an evaluation report and implementation of any
 12 additional measures in the SWPPP to respond to the monitoring results and other inspection
 13 activities within 90 days of the annual evaluation.

14 43. The General Permit requires dischargers to eliminate all non-storm water
 15 discharges to storm water conveyance systems other than those specifically set forth in
 16 Section IV of the General Permit unless authorized by another NPDES permit. General
 17 Permit, Section III. B.

18 44. The General Permit requires dischargers to implement a Monitoring
 19 Implementation Plan. General Permit, Section X.I. As part of their monitoring plan,
 20 dischargers must identify all storm water discharge locations. General Permit, Section X.I.2.
 21 Dischargers must then conduct monthly visual observations of each drainage area, as well as
 22 visual observations during discharge sampling events. General Permit, Section XI.A.1 and
 23 2. Dischargers must also collect and analyze storm water samples from two (2) storm events
 24 within the first half of each reporting year (July 1 to December 31) and two (2) storm events
 25 during the second half of each reporting year (January 1 to June 3). General Permit, Section
 26 XI.B. Section XI.B requires dischargers to sample and analyze during the wet season for
 27 basic parameters such as pH, total suspended solids (“TSS”) and oil and grease (“O&G”),
 28 certain industry-specific parameters, and any other pollutants likely to be in the storm water

1 discharged from the facility base on the pollutant source assessment. General Permit,
 2 Section XI.B.6.

3 45. Dischargers must submit all sampling and analytical results via SMARTS
 4 within thirty (30) days of obtaining all results for each sampling event. Section XI.B.11.
 5 Sampling results must be compared to the two types of Numeric Action Level (“NAL”)
 6 values set forth at Table 2 of the General Permit. General Permit, Section XII. An annual
 7 NAL exceedance occurs when the average of the results for a parameter for all samples
 8 taken within a reporting year exceeds the annual NAL value. General Permit, Section
 9 XII.A.1. An instantaneous NAL exceedance occurs when two (2) or more results from
 10 samples taken for any single parameter within a reporting year exceed the instantaneous
 11 maximum NAL value. General Permit, Section XII.A.2. If a discharger has an NAL
 12 exceedance during a reporting year, the discharger’s status changes to Level 1 status under
 13 the General Permit and the discharger must comply with the requirements set forth for Level
 14 1 status operators set forth at Section XII.C. The discharger’s status shall change to Level 2
 15 status if sampling results indicated an NAL exceedance for a parameter while the discharger
 16 is in Level 1 status. If a discharger becomes Level 2 status it must comply with the
 17 obligations set forth at Section XII.D of the General Permit.

18 46. Dischargers must submit an Annual Report no later than July 15th following
 19 each reporting year certifying compliance with the Permit and/or an explanation for any non-
 20 compliance. General Permit, Section XVI.

21 **V. STATEMENT OF FACTS**

22 47. The Facility is classified as conforming to Standard Industrial Classification
 23 (“SIC”) Codes 5093 (“Scrap and Waste Materials”) and 142X, which includes SIC Codes
 24 1422, 1423, and 1429 (“Crushed and Broken Limestone, Granite, and Stone”). Industrial
 25 activities occur throughout the Facility. CATs’ investigation into the industrial activities at
 26 Defendant’s approximately 37-acre facility indicates that the Facility is used to manufacture
 27 and store rock aggregate products. Moreover, the Facility is used, or has been used in the
 28 past, for storing of scrap roofing shingles, storing scrap metal, and storage for soil and

1 organic debris.

2 48. Most of these activities occur outside in areas that are exposed to storm
 3 water and storm flows due to the lack of overhead coverage, functional berms and other
 4 storm water controls. Plaintiff is informed and believes that Defendants' storm water
 5 controls, to the extent any exist, fail to achieve BAT and BCT standards.

6 49. The management practices at the Facility are wholly inadequate to prevent the
 7 sources of contamination described above from causing the discharge of pollutants to waters
 8 of the United States and fail to meet BAT and BCT standards. The Facility lacks essential
 9 structural controls such as grading, berthing and roofing to prevent rainfall and storm water
 10 flows from coming into contact with these and other sources of contaminants, thereby
 11 allowing storm water to flow over and across these materials and become contaminated prior
 12 to leaving the Facility. In addition, the Facility lacks structural controls to prevent the
 13 discharge of water once contaminated. The Facility also lacks an adequate filtration system
 14 to treat water once it is contaminated.

15 50. During rain events, storm water laden with pollutants discharges from the
 16 Facility to storm water conveyances, which ultimately drain to the Sacramento River and the
 17 Delta.

18 51. Information available to Plaintiff indicates that as a result of these practices,
 19 storm water containing pollutants harmful to fish, plant and bird life, and human health are
 20 being discharged from the Facility directly to these waters during significant rain events.

21 52. Information available to Plaintiff indicates that Defendants have not fulfilled
 22 the requirements set forth in the General Permit for discharges from the Facility due to the
 23 continued discharge of contaminated storm water.

24 53. Plaintiff is informed and believes, and thereupon alleges, that Defendants have
 25 failed to develop and implement an adequate Storm Water Pollution Prevention Plan at the
 26 Facility.

27 54. Information available to Plaintiff indicates the continued existence of unlawful
 28 storm water discharges at the Facility.

1 55. Plaintiff is informed and believes, and thereupon alleges, that Defendants have
 2 failed to develop and implement adequate storm water monitoring, reporting and sampling
 3 programs at the Facility. Plaintiff is informed and believes, and thereupon alleges, that
 4 Defendants have not sampled with adequate frequency, have not conducted visual
 5 monitoring, and have not analyzed the storm water samples collected at the Facility for the
 6 required pollutant parameters.

7 56. Plaintiff is informed and believes, and thereupon alleges, that all of the
 8 violations alleged in this Complaint are ongoing and continuing.

9 **VI. CLAIMS FOR RELIEF**

10 **FIRST CLAIM FOR RELIEF**

11 **Discharges of Contaminated Storm Water From The Facility
 12 in Violation of Permit Conditions and the Act
 13 (Violations of 33 U.S.C. §§ 1311(a), 1342)**

14 57. Plaintiff incorporates the allegations contained in the above paragraphs as
 15 though fully set forth herein.

16 58. Receiving Water Limitations VI.A and VI.B of the General Permit require that
 17 storm water discharges and authorized non-storm water discharges shall not adversely impact
 18 human health or the environment, and shall not cause or contribute to a violation of any water
 19 quality standards in any affected receiving water. Discharge Prohibition III.C of the General
 20 Permit requires that storm water discharges and authorized non-storm water discharges shall
 21 not cause or threaten to cause pollution, contamination, or nuisance.

22 59. Plaintiff is informed and believes, and thereupon alleges, that since at least
 23 January 19, 2012, Defendants have been discharging polluted storm water from the Facility
 24 into Hall Creek, which ultimately drains to Mad River in violation of the General Permit.

25 60. During every significant rain event, storm water flowing over and through
 26 materials at the Facility becomes contaminated with pollutants, flowing untreated from the
 27 Facility into Hall Creek, which ultimately drains to Mad River.

28 61. Plaintiff is informed and believes, and thereupon alleges, that these discharges
 29 of contaminated storm water are causing pollution and contamination of waters of the United

1 States in violation of Discharge Prohibition III.C of the General Permit.

2 62. Plaintiff is informed and believes, and thereupon allege, that these discharges
3 of contaminated storm water are adversely affecting human health and the environment in
4 violation of Receiving Water Limitations VI.A and VI.B of the General Permit.

5 63. Plaintiff is informed and believes, and thereupon alleges, that these discharges
6 of contaminated storm water are contributing to the violation of the applicable water quality
7 standards in the Statewide Water Quality Control Plan, the applicable Regional Board's Basin
8 Plan, and/or the CTR, in violation of Receiving Water Limitation VI.A of the General Permit.

9 64. Plaintiff is informed and believes, and thereupon alleges, that every day since
10 April 29, 2011, Defendants have discharged and continue to discharge polluted storm water
11 from the Facility in violation of the General Permit. These violations are ongoing and
12 continuous.

13 65. Every day Defendants have discharged and continue to discharge polluted
14 storm water from the Facility in violation of the General Permit is a separate and distinct
15 violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). Defendants are subject to civil
16 penalties for each and every violation of the Act since January 19, 2012. *See* 33 U.S.C.
17 §§1319 (d), 1365; 40 C.F.R. §19.4 (2008).

SECOND CLAIM FOR RELIEF

**Failure to Develop and Implement an Adequate
Storm Water Pollution Prevention Plan For the Facility
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

66. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

2 67. Section X of the General Permit require dischargers of storm water
3 associated with industrial activity to develop and implement an adequate SWPPP prior to
4 commencement of industrial activities.

68. Defendants have failed to develop and implement an adequate SWPPP for the Facility. Defendants' ongoing failure to develop and implement an adequate SWPPP for the Facility is evidenced by, *inter alia*, Defendants' outdoor storage of industrial materials

1 without appropriate best management practices; the continued exposure of significant
 2 quantities of industrial materials to storm water flows; the failure to either treat storm water
 3 prior to discharge or to implement effective containment practices; and the continued
 4 discharge of storm water pollutants from the Facility at levels in excess of EPA benchmark
 5 values and other applicable water quality standards.

6 69. Defendants have further failed to update the Facility's SWPPP in response to
 7 the analytical results of the Facility's storm water monitoring as required by the General
 8 Permit. General Permit, Sections X.B.1 and X.C.1.b. Defendants continue to be in violation
 9 of the Act each day that they fail to develop and fully implement an adequate SWPPP for the
 10 Facility. These violations are ongoing and continuous.

11 70. Each day that Defendants have failed to develop and implement an adequate
 12 SWPPP for the Facility in violation of the General Permit is a separate and distinct violation of
 13 Section 301(a) of the Act, 33 U.S.C. § 1311(a). Defendants are subject to civil penalties for
 14 each and every violation of the Act since April 29, 2011. *See* 33 U.S.C. §§1319 (d), 1365;
 15 40 C.F.R. §19.4 (2008).

16 **THIRD CLAIM FOR RELIEF**

17 **Failure to Develop and Implement the Best Available
 18 And Best Conventional Treatment Technologies at the Facility
 19 (Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

20 71. Plaintiff incorporates the allegations contained in the above paragraphs as
 21 though fully set forth herein.

22 72. The General Permit's SWPPP requirements and Effluent Limitation D.32
 23 require dischargers to reduce or prevent pollutants in their storm water discharges through
 24 implementation of BAT for toxic and nonconventional pollutants and BCT for conventional
 25 pollutants.

26 73. Defendants have failed to implement BAT and BCT at the Facility for their
 27 discharges of TSS, zinc, aluminum, iron, copper, and COD in violation of Effluent
 28 Limitation D.32 of the General Permit.

74. Each day that Defendants have failed to develop and implement BAT and

1 BCT at the Facility in violation of the General Permit is a separate and distinct violation of
2 Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3 75. Defendants continue to be in violation of the BAT and BCT requirements each
4 day that it fails to develop and fully implement BMPs meeting the BAT and BCT standards.
5 These violations are ongoing and continuous.

6 76. Defendants have been in violation of the BAT and BCT requirements at the
7 Facility every day since at least January 19, 2012. Defendants are subject to civil penalties
8 for each and every violation of the Act since January 19, 2012. *See* 33 U.S.C. §§1319 (d),
9 1365; 40 C.F.R. §19.4 (2008).

FOURTH CLAIM FOR RELIEF

Failure to Develop and Implement an Adequate Monitoring Implementation Plan for the Facility

(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)

3 77. Plaintiff incorporates the allegations contained in the above paragraphs as
though fully set forth herein.

5 78. Section X.I and Section XI. of the General Permit require dischargers of storm
6 water associated with industrial activity to develop and implement a monitoring
7 implementation plan (including, among other things, sampling and analysis of discharges)
prior to commencement of industrial activities.

9 79. Defendants have failed to develop and implement an adequate monitoring
10 implementation plan for the Facility. Defendants' ongoing failures to develop and implement
11 adequate monitoring and reporting programs are evidenced by, *inter alia*, their continuing
12 failure to collect and analyze storm water samples from all discharge locations, their
13 continuing failure to analyze storm water samples for pollutants likely to be present in the
14 Facility's storm water discharges in significant quantities and other pollutants, including Total
15 Suspended Solids – 100 mg/L, Oil & Grease – 15 mg/L, Lead – 0.262 mg/L, Copper – 0.0048
16 mg/L, Aluminum – 0.75 mg/L, Zinc – 0.117 mg/L, and Chemical Oxygen Demand – 120
17 mg/L, as the General Permit requires, and its failure to file required Annual Reports with the
18 Regional Board which provide required documentation and information relating to visual

1 observations and storm water sampling and analysis conducted at the Facility.

2 80. Defendants have failed to develop and implement an adequate monitoring
 3 and reporting program for the Facility in each day since at least January 19, 2012. These
 4 violations are ongoing and continuous.

5 81. Each day of violation of the General Permit is a separate and distinct
 6 violation of Section 301(a) of the Act, 33 U.S.C. §1311(a). Defendants are subject to civil
 7 penalties for each and every violation of the Act since January 19, 2012. *See* 33 U.S.C.
 8 §§1319 (d), 1365; 40 C.F.R. §19.4 (2008).

9

10 **VII. RELIEF REQUESTED**

11 Wherefore, CATs respectfully requests that this Court grant the following relief:

12 a. Declare Defendants to have violated and to be in violation of CWA section
 13 301(a), 33 U.S.C. § 1311(a), for discharging pollutants from its the Facility in violation of a
 14 permit issued pursuant to CWA section 402, 33 U.S.C. § 1342 and for failing to comply
 15 with all substantive and procedural requirements of the General Permit and the CWA as
 16 alleged herein;

17 b. Enjoin Defendants from discharging pollutants from the Facility and to the
 18 surface waters surrounding and downstream from the Facility in violation of the Act and the
 19 General Permit;

20 c. Enjoin Defendants from further violating the substantive and procedural
 21 requirements of the General Permit;

22 d. Order Defendants to pay civil penalties of \$37,500 per day per violation for
 23 all violations occurring after January 19, 2012, pursuant to Sections 309(d) and 505(a) of the
 24 Act, 33 U.S.C. §§ 1319(d) and 1365(a) and 40 C.F.R. §§ 19.1–19.4 (2008);

25 e. Order Defendants to take appropriate actions to restore the quality of
 26 navigable waters impaired by their activities;

27 f. Award Plaintiff's costs and fees (including reasonable attorney, witness, and
 28 consultant fees) as authorized by the Act, 33 U.S.C. § 1365(d); and,

1 g. Award any such other and further relief as this Court may deem appropriate.
2

3 Dated: July 15, 2016

Respectfully Submitted,

4 LAW OFFICES OF ANDREW L. PACKARD

5 By: /s/ Andrew L. Packard

6 Andrew L. Packard
7 Attorneys for Plaintiff
8 CALIFORNIANS FOR
ALTERNATIVES TO TOXICS

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EXHIBIT A

LAW OFFICES OF
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May 13, 2016

VIA CERTIFIED MAIL

Scott Farley, Partner
Kernen Construction Co.
P.O. Box 1340
Blue Lake, CA 95525

Scott Farley, Partner
Kernen Construction Co., Glendale Yard
2350 Glendale Drive
McKinleyville, CA 95519

Kurt Kernen, Agent for Service of Process
Bedrock Investments, LLC
2350 Glendale Road
Arcata, CA 95519

**Re: NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE
FEDERAL WATER POLLUTION CONTROL ACT (“CLEAN WATER ACT”)
(33 U.S.C. §§ 1251 *et seq.*)**

Dear Mr. Farley and Mr. Kernen:

This firm represents Californians for Alternatives to Toxics (“CATs”) in regard to violations of the Clean Water Act (“the Act”) occurring at Kernen Construction Company’s (“Kernen Construction”) Glendale Yard located at 2350 Glendale Drive, in McKinleyville, California (the “Facility”). This letter is being sent to you as the responsible owners, officers and/or operators of the Facility. Unless otherwise noted, Kernen Construction Co., Bedrock Investments, LLC, Mr. Farley and Mr. Kernen shall hereinafter be collectively referred to as “Kernen Construction.” CATs is a non-profit association dedicated to the preservation, protection and defense of the environment, wildlife and natural resources of California waters, including the waters into which Kernen Construction discharges polluted storm water.

Kernen Construction is in ongoing violation of the substantive and procedural requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and National Pollutant Discharge Elimination System (“NPDES”) General Permit No. CAS000001, State Water Resources Control Board Water Quality Order No. 91-13-DWQ, as amended by Order No. 92-12-DWQ, Order No. 97-03-DWQ, and Order 2014-0057-DWQ (“General Permit” or “Permit”).¹

On July 1, 2015 the 2015 General Permit went into effect, superseding the 1997 General Permit that was operative between 1997 and June 30, 2015. The 2015 General Permit includes

¹ Kernen Construction submitted a Notice of Intent (NOI) to comply with the General Permit for the Glendale Yard Facility on or about June 8, 2015.

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many of the same fundamental requirements and implements many of the same statutory requirements as the 1997 General Permit. Violations of both the 1997 and 2015 General Permit provisions are enforceable under the law. 2015 General Permit, Finding A.6.

Pursuant to Section 309(d) of the Act (33 U.S.C. § 1319(d)) and the Adjustment of Civil Monetary Penalties for Inflation (40 C.F.R. § 19.4) each separate violation of the Act subjects Kernen Construction to a penalty of up to \$37,500 per day per violation for all violations occurring during the period commencing five years prior to the date of this Notice of Violations and Intent to File Suit. In addition to civil penalties, CATs will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d) (33 U.S.C. §1365(a) and (d)) and such other relief as permitted by law. Lastly, Section 505(d) of the Act (33 U.S.C. § 1365(d)) permits prevailing parties to recover costs and fees, including attorneys' fees.

The Clean Water Act requires that sixty (60) days prior to the initiation of a citizen-enforcement action under Section 505(a) of the Act (33 U.S.C. § 1365(a)), a citizen enforcer must give notice of its intent to file suit. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency, and the Chief Administrative Officer of the water pollution control agency for the State in which the violations occur. *See* 40 C.F.R. § 135.2. As required by the Act, this letter provides statutory notice of the violations that have occurred, and continue to occur, at the Facility. 40 C.F.R. § 135.3(a). At the expiration of sixty (60) days from the date of this letter, CATs intends to file suit under Section 505(a) of the Act in federal court against Kernen Construction for violations of the Clean Water Act and the Permit.

I. Background.

A. The Clean Water Act.

Congress enacted the CWA in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Act prohibits the discharge of pollutants into United States waters except as authorized by the statute. 33 U.S.C. § 1311; *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1156 (9th Cir. 2002). The Act is administered largely through the NPDES permit program. 33 U.S.C. § 1342. In 1987, the Act was amended to establish a framework for regulating storm water discharges through the NPDES system. Water Quality Act of 1987, Pub. L. 100-4, § 405, 101 Stat. 7, 69 (1987) (codified at 33 U.S.C. § 1342(p)); *see also Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840-41 (9th Cir. 2003) (describing the problem of storm water runoff and summarizing the Clean Water Act's permitting scheme). The discharge of pollutants without an NPDES permit, or in violation of a permit, is illegal. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1145 (9th Cir. 2000).

Much of the responsibility for administering the NPDES permitting system has been delegated to the states. *See* 33 U.S.C. § 1342(b); *see also* Cal. Water Code § 13370 (expressing California's intent to implement its own NPDES permit program). The CWA authorizes states with approved NPDES permit programs to regulate industrial storm water discharges through individual permits issued to dischargers and/or through the issuance of a single, statewide

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general permit applicable to all industrial storm water dischargers. 33 U.S.C. § 1342(b). Pursuant to Section 402 of the Act, the Administrator of EPA has authorized California's State Board to issue individual and general NPDES permits in California. 33 U.S.C. § 1342

B. California's General Permit for Storm Water Discharges Associated with Industrial Activities

Between 1997 and June 30, 2015, the General Permit in effect was Order No. 97-03-DWQ, which CATs refers to as the "1997 General Permit." On July 1, 2015, pursuant to Order No. 2015-0057-DWQ the General Permit was reissued, including many of the same fundamental terms as the prior permit. For purposes of this notice letter, CATs refers to the reissued permit as the "2015 General Permit." The 2015 General Permit rescinded in whole the 1997 General Permit, except for the expired permit's requirement that annual reports be submitted by July 1, 2015, and for purposes of CWA enforcement. 2015 General Permit, Finding A.6.

Facilities discharging, or having the potential to discharge, storm water associated with industrial activities that have not obtained an individual NPDES permit must apply for coverage under the General Permit by filing a Notice of Intent to Comply ("NOI"). 1997 General Permit, Provision E.1; 2015 General Permit, Standard Condition XXI.A. Facilities must file their NOIs before the initiation of industrial operations. *Id.*

Facilities must strictly comply with all of the terms and conditions of the General Permit. A violation of the General Permit is a violation of the CWA.

The General Permit contains three primary and interrelated categories of requirements: (1) discharge prohibitions, receiving water limitations and effluent limitations; (2) Storm Water Pollution Prevention Plan ("SWPPP") requirements; and, (3) self-monitoring and reporting requirements.

C. Kernen Construction's Glendale Yard Facility

Kernen Construction's primary industrial activities at the approximately 37-acre Facility include storing and manufacturing rock aggregate products, storing scrap roofing shingles, storing scrap metal and storage for soil and organic debris. The industrial activities at the Facility fall under Standard Industrial Classification ("SIC") Code 5093 and 142X, which includes SIC Codes 1422, 1423, and 1429.

Kernen Construction collects and discharges storm water associated with industrial activities at the Facility through at least four (4) discharge points into Hall Creek, a tributary of Mad River, which ultimately flows into the Pacific Ocean. Hall Creek and Mad River are waters of the United States within the meaning of the Clean Water Act.

The General Permit requires Kernen Construction to analyze storm water samples for TSS, pH, and Oil and Grease. 1997 General Permit, Section B.5.c.i; 2015 General Permit, Section XI.B.6. Facilities under SIC Code 5093 must also analyze storm water samples for Iron ("Fe"); Lead ("Pb"); Aluminum ("Al"); Zinc ("Zn"); and Chemical Oxygen Demand ("COD"). 1997 General Permit, Tables 1-2; 2015 General Permit Tables 1-2.

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II. Kernen Construction's Violations of the Act and Permit.

Based on its review of available public documents, CATs is informed and believes that Kernen Construction is in ongoing violation of both the substantive and procedural requirements of the CWA and the General Permit. These violations are ongoing and continuous. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, Kernen Construction is subject to penalties for violations of the Act since May 13, 2011.

A. Kernen Construction Discharges Storm Water Containing Pollutants in Violation of the General Permit's Discharge Prohibitions, Receiving Water Limitations and Effluent Limitations.

Kernen Construction's storm water sampling results provide conclusive evidence of Kernen Construction's failure to comply with the General Permit's discharge prohibitions, receiving water limitations and effluent limitations. Self-monitoring reports under the Permit are deemed "conclusive evidence of an exceedance of a permit limitation." *Sierra Club v. Union Oil*, 813 F.2d 1480, 1493 (9th Cir. 1988).

1. Applicable Water Quality Standards.

The General Permit requires that storm water discharges and authorized non-storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance. 1997 General Permit, Discharge Prohibition A.2; 2015 General Permit, Discharge Prohibition III.C. The General Permit also prohibits discharges that violate any discharge prohibition contained in the applicable Regional Water Board's Basin Plan or statewide water quality control plans and policies. 1997 General Permit, Receiving Water Limitation C.2; 2015 General Permit, Discharge Prohibition III.D. Furthermore, storm water discharges and authorized non-storm water discharges shall not adversely impact human health or the environment, and shall not cause or contribute to a violation of any water quality standards in any affected receiving water. 1997 General Permit, Receiving Water Limitations C.1, C.2; 2015 General Permit, Receiving Water Limitations VI.A, VI.B.

Dischargers are also required to prepare and submit documentation to the Regional Board upon determination that storm water discharges are in violation of the General Permit's Receiving Water Limitations. 1997 General Permit, p. VII; 2015 General Permit, Special Condition XX.B. The documentation must describe changes the discharger will make to its current storm water best management practices ("BMPs") in order to prevent or reduce any pollutant in its storm water discharges that is causing or contributing to an exceedance of water quality standards. *Id.*

The California Toxics Rule ("CTR") is an applicable water quality standard under the Permit, violation of which is a violation of Permit conditions. *Cal. Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.*, 2015 U.S. Dist. LEXIS 108314, *21 (E.D. Cal. 2015). CTR establishes

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numeric receiving water limits for toxic pollutants in California surface waters. 40 C.F.R. § 131.38. The CTR establishes the following numeric limits for pollutants discharged by Kernen Construction: Copper – 0.013 mg/L (maximum concentration) and Lead – 0.065 mg/L (maximum concentration).

The *Water Quality Control Plan for the North Coast Region (Revised May 2011)* (“Basin Plan”) also sets forth water quality standards and prohibitions applicable to Kernen Construction’s storm water discharges. The Basin Plan identifies present and potential beneficial uses for the Mad River, which include municipal and domestic water supply, hydropower generation, agricultural supply, industrial service supply, navigation, wildlife habitat, warm freshwater habitat, cold freshwater habitat, warm and cold spawning, and contact and non-contact water recreation.

2. Applicable Effluent Limitations.

Dischargers are required to reduce or prevent pollutants in their storm water discharges through implementation of best available technology economically achievable (“BAT”) for toxic and nonconventional pollutants and best conventional pollutant control technology (“BCT”) for conventional pollutants. 1997 General Permit, Effluent Limitation B.3; 2015 General Permit, Effluent Limitation V.A. Conventional pollutants include Total Suspended Solids, Oil & Grease, pH, Biochemical Oxygen Demand and Fecal Coliform. 40 C.F.R. § 401.16. All other pollutants are either toxic or nonconventional. 40 C.F.R. §§ 401.15-16.

Under the General Permit, benchmark levels established by the EPA (“EPA benchmarks”) serve as guidelines for determining whether a facility discharging industrial storm water has implemented the requisite BAT and BCT. *Santa Monica Baykeeper v. Kramer Metals*, 619 F.Supp.2d 914, 920, 923 (C.D. Cal 2009); 1997 General Permit, Effluent Limitations B.5-6; 2015 General Permit, Exceedance Response Action XII.A.

The following EPA benchmarks have been established for pollutants discharged by Kernen Construction: Total Suspended Solids – 100 mg/L; Oil & Grease – 15.0 mg/L; Chemical Oxygen Demand – 120 mg/L; Aluminum – 0.75 mg/L; Iron – 1.00 mg/L; Zinc – 0.117 mg/L; and Copper – 0.0636 mg/L.

3. Kernen Construction’s Storm Water Sample Results

The following discharges of pollutants from the Facility have violated the discharge prohibitions, receiving water limitations and effluent limitations of the Permit:

- a. **Discharge of Storm Water Containing Total Suspended Solids (TSS) at Concentrations in Excess of Applicable EPA Benchmark Value**

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Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)
1/28/16	Site #1	TSS	650	100
1/28/16	Site #2	TSS	3800	100
1/28/16	Site #3	TSS	480	100
12/18/15	Site #1	TSS	170	100
12/18/15	Site #2	TSS	240	100
12/18/15	Site #3	TSS	140	100
12/3/15	Site #1	TSS	1500	100
12/3/15	Site #2	TSS	1300	100
12/3/15	Site #3	TSS	650	100
2/6/15	Site #2	TSS	300	100
2/6/15	Site #3	TSS	1500	100
12/10/14	Site #2	TSS	290	100
12/10/14	Site #3	TSS	310	100
2/7/14	Site #2	TSS	330	100
2/7/14	Site #3	TSS	670	100
12/20/12	Site #1	TSS	110	100
12/20/12	Site #2	TSS	1100	100
4/26/12	Site #2	TSS	230	100
1/19/12	Site #2	TSS	290	100
1/19/12	Site #3	TSS	600	100

b. Discharge of Storm Water Containing Zinc (Zn) at Concentrations in Excess of Applicable EPA Benchmark and CTR Values

Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)	CTR Criteria (mg/L)
1/14/16	Site #1	Zn	0.270	0.117	0.12
1/14/16	Site #2	Zn	0.370	0.117	0.12
12/18/15	Site 1	Zn	0.120	0.117	0.12
12/3/15	Site #1	Zn	0.550	0.117	0.12
12/3/15	Site #2	Zn	0.320	0.117	0.12
12/3/15	Site #3	Zn	0.140	0.117	0.12
2/6/15	Site #2	Zn	0.160	0.117	0.12
2/6/15	Site #3	Zn	0.270	0.117	0.12
12/10/14	Site #2	Zn	0.120	0.117	0.12
2/7/14	Site #2	Zn	0.210	0.117	0.12
2/7/14	Site #3	Zn	0.130	0.117	0.12
12/20/12	Site #2	Zn	0.373	0.117	0.12

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4/26/12	Site #2	Zn	0.130	0.117	0.12
1/19/12	Site #2	Zn	0.140	0.117	0.12

c. Discharge of Storm Water Containing Chemical Oxygen Demand (COD) at Concentrations in Excess of Applicable EPA Benchmark Value

Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)
1/14/16	Site #1	COD	190	120
1/14/16	Site #2	COD	330	120
12/3/15	Site #1	COD	590	120
12/3/15	Site #2	COD	440	120

d. Discharge of Storm Water Containing Aluminum (Al) at Concentrations in Excess of Applicable EPA Benchmark Value

Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)
1/14/16	Site #1	Al	24	0.75
1/14/16	Site #2	Al	120	0.75
1/14/16	Site #3	Al	23	0.75
12/18/15	Site 1	Al	12	0.75
12/18/15	Site 2	Al	30	0.75
12/18/15	Site 3	Al	24	0.75
12/3/15	Site #1	Al	74	0.75
12/3/15	Site #2	Al	61	0.75
12/3/15	Site #3	Al	34	0.75
2/6/15	Site #1	Al	8.2	0.75
2/6/15	Site #2	Al	15	0.75
2/6/15	Site #3	Al	69	0.75
12/10/14	Site #1	Al	4.9	0.75
12/10/14	Site #2	Al	13	0.75
12/10/14	Site #3	Al	18	0.75
12/10/14	Site #4	Al	0.940	0.75
2/7/14	Site #1	Al	4.5	0.75
2/7/14	Site #2	Al	18	0.75
2/7/14	Site #3	Al	25	0.75
12/20/12	Site #1	Al	3.31	0.75
12/20/12	Site #2	Al	23.1	0.75
4/26/12	Site #1	Al	1.9	0.75
4/26/12	Site #2	Al	9.8	0.75

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1/19/12	Site #1	Al	5.3	0.75
1/19/12	Site #2	Al	12	0.75
1/19/12	Site #3	Al	20	0.75

e. Discharge of Storm Water Containing Iron (Fe) at Concentrations in Excess of Applicable EPA Benchmark Value

Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)
1/14/16	Site #1	Fe	39	1.0
1/14/16	Site #2	Fe	230	1.0
1/14/16	Site #3	Fe	24	1.0
12/18/15	Site 1	Fe	15	1.0
12/18/15	Site 2	Fe	48	1.0
12/18/15	Site 3	Fe	23	1.0
12/3/15	Site #1	Fe	110	1.0
12/3/15	Site #2	Fe	94	1.0
12/3/15	Site #3	Fe	52	1.0
2/6/15	Site #1	Fe	7.4	1.0
2/6/15	Site #2	Fe	22	1.0
2/6/15	Site #3	Fe	110	1.0
12/10/14	Site #1	Fe	6.1	1.0
12/10/14	Site #2	Fe	20	1.0
12/10/14	Site #3	Fe	31	1.0
12/10/14	Site #4	Fe	1.3	1.0
2/7/14	Site #1	Fe	4.4	1.0
2/7/14	Site #2	Fe	27	1.0
2/7/14	Site #3	Fe	37	1.0
12/20/12	Site #1	Fe	4.7	1.0
12/20/12	Site #2	Fe	34.2	1.0
12/20/12	Site #4	Fe	1.07	1.0
4/26/12	Site #1	Fe	2.3	1.0
4/26/12	Site #2	Fe	13	1.0
1/19/12	Site #1	Fe	6.5	1.0
1/19/12	Site #2	Fe	17	1.0
1/19/12	Site #3	Fe	28	1.0

f. Discharge of Storm Water Containing Copper (Cu) at Concentrations in Excess of Applicable EPA Benchmark and CTR Values

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Date	Discharge Point	Parameter	Concentration in Discharge (mg/L)	EPA Benchmark Value (mg/L)	CTR Criteria (mg/L)
2/6/15	Site #2	Cu	0.029	0.0636	0.013
2/6/15	Site #3	Cu	0.094	0.0636	0.013
12/10/14	Site #2	Cu	0.028	0.0636	0.013
12/10/14	Site #3	Cu	0.034	0.0636	0.013
12/10/14	Site #4	Cu	0.014	0.0636	0.013
2/7/14	Site #2	Cu	0.043	0.0636	0.013
2/7/14	Site #3	Cu	0.046	0.0636	0.013
12/20/12	Site #2	Cu	0.0614	0.0636	0.013
4/26/12	Site #2	Cu	0.020	0.0636	0.013
1/19/12	Site #2	Cu	0.024	0.0636	0.013
1/19/12	Site #3	Cu	0.051	0.0636	0.013

g. Discharges of Storm Water Exceeding the Basin Plan Standards for pH

Date	Discharge Point	Parameter	Concentration in Discharge (pH units)	Basin Plan (pH units)
2/6/15	Site #3	pH	8.76	6.5 – 8.5
4/26/12	Site #1	pH	6.2	6.5 – 8.5
1/19/12	Site #2	pH	8.7	6.5 – 8.5
1/19/12	Site #3	pH	9.9	6.5 – 8.5

h. Kernen Construction's Sample Results Are Evidence of Violations of the General Permit

Kernen Construction's sample results demonstrate violations of the Permit's discharge prohibitions, receiving water limitations and effluent limitations set forth above. CATs is informed and believes that Kernen Construction has known that its storm water contains pollutants at levels exceeding General Permit standards since at least May 13, 2011.

CATs alleges that such violations occur each time storm water discharges from the Facility. Attachment A hereto, sets forth the specific rain dates on which CATs alleges that Kernen Construction has discharged storm water containing impermissible levels of TSS, COD, Al, Fe, Zn, Cu, and pH in violation of the General Permit. 1997 General Permit, Discharge Prohibition A.2, Receiving Water Limitations C.1 and C.2; 2015 General Permit, Discharge Prohibitions III.C and III.D, Receiving Water Limitations VI.A, VI.B.

4. Kernen Construction Has Failed to Implement BAT and BCT

Dischargers must implement BMPs that fulfill the BAT/BCT requirements of the CWA and the General Permit to reduce or prevent discharges of pollutants in their storm water

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discharges. 1997 General Permit, Effluent Limitation B.3; 2015 General Permit, Effluent Limitation V.A. To meet the BAT/BCT standard, dischargers must implement minimum BMPs and any advanced BMPs set forth in the General Permit's SWPPP Requirements provisions where necessary to reduce or prevent pollutants in discharges. *See* 1997 General Permit, Sections A.8.a-b; 2015 General Permit, Sections X.H.1-2.

Kernen Construction has failed to implement the minimum BMPs required by the General Permit, including: good housekeeping requirements; preventive maintenance requirements; spill and leak prevention and response requirements; material handling and waste management requirements; erosion and sediment controls; employee training and quality assurance; and record keeping. Permit, Section X.H.1(a-g).

Kernen Construction has further failed to implement advanced BMPs necessary to reduce or prevent discharges of pollutants in its storm water sufficient to meet the BAT/BCT standards, including: exposure minimization BMPs; containment and discharge reduction BMPs; treatment control BMPs; or other advanced BMPs necessary to comply with the General Permit's effluent limitations. 1997 General Permit, Section A.8.b; 2015 General Permit, Sections X.H.2.

Each day that Kernen Construction have failed to develop and implement BAT and BCT at the Facility in violation of the General Permit is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). Kernen Construction have been in violation of the BAT and BCT requirements at the Facility every day since at least May 13, 2011.

5. Kernen Construction Has Failed to Implement an Adequate Monitoring Implementation Plan.

The General Permit requires dischargers to implement a Monitoring Implementation Plan. Permit, Section X.I. As part of their monitoring plan, dischargers must identify all storm water discharge locations. Permit, Section X.I.2. Dischargers must then conduct monthly visual observations of each drainage area, as well as visual observations during discharge sampling events. General Permit, Section XI.A.1 and 2.

Dischargers must collect and analyze storm water samples from two (2) storm events within the first half of each reporting year (July 1 to December 31) and two (2) storm events during the second half of each reporting year (January 1 to June 3). General Permit, Section XI.B. Section XI.B requires dischargers to sample and analyze during the wet season for basic parameters such as pH, total suspended solids ("TSS") and oil and grease ("O&G"), certain industry-specific parameters set forth in Table 2 of the General Permit, and other pollutants likely to be in the storm water discharged from the facility based on the pollutant source assessment. Permit, Section XI.B.6. Dischargers must submit all sampling and analytical results via SMARTS within thirty (30) days of obtaining all results for each sampling event. Section XI.B.11.

Notice of Violation and Intent To File Suit

May 13, 2016

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Kernen Construction has failed to develop and implement an adequate Monitoring Implementation Plan. These failures include using incorrect test methods to analyze samples and failing to analyze each sample for all required parameters.

Each day that Kernen Construction has failed to develop and implement an adequate Monitoring Implementation Plan is a separate and distinct violation of the Act and Permit. Kernen Construction has been in violation of the Monitoring Implementation Plan requirements every day since at least May 13, 2011.

6. Kernen Construction Has Failed to Develop and Implement an Adequate Storm Water Pollution Prevention Plan.

The General Permit requires dischargers to develop and implement a site-specific SWPPP. 1997 General Permit, Section A.1; 2015 General Permit, Section X.A. The SWPPP must include, among other elements: (1) the facility name and contact information; (2) a site map; (3) a list of industrial materials; (4) a description of potential pollution sources; (5) an assessment of potential pollutant sources; (6) minimum BMPs; (7) advanced BMPs, if applicable; (8) a monitoring implementation plan; (9) annual comprehensive facility compliance evaluation; and (10) the date that the SWPPP was initially prepared and the date of each SWPPP amendment, if applicable. *See id.*

Dischargers must revise their SWPPP whenever necessary and certify and submit via the Regional Board's Storm Water Multiple Application and Report Tracking System ("SMARTS") their SWPPP within 30 days whenever the SWPPP contains significant revisions(s); and, certify and submit via SMARTS for any non-significant revisions not more than once every three (3) months in the reporting year. 2015 General Permit, Section X.B; see also 1997 General permit, Section A.

CATs's investigation indicates that Kernen Construction has been operating with an inadequately developed or implemented SWPPP in violation of General Permit requirements. Kernen Construction has failed to evaluate the effectiveness of its BMPs and to revise its SWPPP as necessary, resulting in the Facility's numerous effluent limitation violations.

Each day Kernen Construction failed to develop and implement an adequate SWPPP is a violation of the General Permit. The SWPPP violations described above were at all times in violation of Section A of the 1997 General Permit, and Section X of the 2015 General Permit. Kernen Construction has been in violation of these requirements at the Facility every day since at least May 13, 2011.

III. Persons Responsible for the Violations.

CATs puts Kernen Construction on notice that they are the persons and entities responsible for the violations described above. If additional persons are subsequently identified as also being responsible for the violations set forth above, CATs puts Kernen Construction on formal notice that it intends to include those persons in this action.

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IV. Name and Address of Noticing Parties.

The name, address and telephone number of each of the noticing parties is as follows:

Patricia Clary, Executive Director
Californians for Alternatives to Toxics
P.O. Box 900
Eureka, CA 95502
(707) 834-4833

V. Counsel.

CATs has retained legal counsel to represent it in this matter. Please direct all communications to:

Andrew L. Packard
Megan E. Truxillo
William N. Carlon
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(707) 630-5061
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VI. Conclusion

CATs believes this Notice of Violations and Intent to File Suit sufficiently states grounds for filing suit. We intend to file a citizen suit under Section 505(a) of the CWA against Kernen Construction Company and their agents for the above-referenced violations upon the expiration of the 60-day notice period. If you wish to pursue remedies in the absence of litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Notice of Violation and Intent To File Suit

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Sincerely,



Andrew L. Packard

Law Offices of Andrew L. Packard

Counsel for Californians for Alternatives to Toxics

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SERVICE LIST

VIA CERTIFIED MAIL

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Jared Blumenfield, Regional Administrator
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Hon. Loretta Lynch
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Thomas Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Matthias St. John, Executive Officer
North Coast Regional Water Quality Control Board
5550 Skylane Boulevard Suite A
Santa Rosa, CA 95403

ATTACHMENT A**Notice of Intent to File Suit, Kernen Construction**
Significant Rain Events,* 5/13/2011 – 5/13/2016

May 15, 2011	January 19, 2012	April 10, 2012	December 4, 2012
May 16, 2011	January 20, 2012	April 11, 2012	December 5, 2012
May 17, 2011	January 21, 2012	April 12, 2012	December 12, 2012
May 18, 2011	January 22, 2012	April 13, 2012	December 16, 2012
May 25, 2011	January 23, 2012	April 14, 2012	December 17, 2012
May 26, 2011	January 25, 2012	April 17, 2012	December 18, 2012
May 27, 2011	January 26, 2012	April 18, 2012	December 19, 2012
May 28, 2011	January 30, 2012	April 19, 2012	December 20, 2012
May 29, 2011	February 1, 2012	April 20, 2012	December 21, 2012
May 31, 2011	February 8, 2012	April 26, 2012	December 22, 2012
June 1, 2011	February 10, 2012	April 27, 2012	December 23, 2012
June 2, 2011	February 11, 2012	May 3, 2012	December 24, 2012
June 6, 2011	February 13, 2012	May 4, 2012	December 25, 2012
June 28, 2011	February 18, 2012	May 22, 2012	December 26, 2012
June 29, 2011	February 25, 2012	May 25, 2012	December 27, 2012
July 19, 2011	February 29, 2012	June 3, 2012	December 29, 2012
September 25, 2011	March 1, 2012	June 4, 2012	January 10, 2013
October 3, 2011	March 2, 2012	June 5, 2012	January 11, 2013
October 4, 2011	March 6, 2012	June 23, 2012	January 24, 2013
October 5, 2011	March 11, 2012	June 26, 2012	January 26, 2013
October 6, 2011	March 12, 2012	July 1, 2012	January 27, 2013
October 10, 2011	March 13, 2012	July 17, 2012	January 28, 2013
October 11, 2011	March 15, 2012	July 18, 2012	February 6, 2013
October 12, 2011	March 16, 2012	July 20, 2012	February 7, 2013
November 3, 2011	March 17, 2012	October 12, 2012	February 8, 2013
November 4, 2011	March 18, 2012	October 13, 2012	February 19, 2013
November 6, 2011	March 19, 2012	October 16, 2012	February 20, 2013
November 7, 2011	March 20, 2012	October 20, 2012	February 23, 2013
November 17, 2011	March 21, 2012	October 22, 2012	February 28, 2013
November 18, 2011	March 22, 2012	October 23, 2012	March 1, 2013
November 19, 2011	March 24, 2012	October 24, 2012	March 6, 2013
November 20, 2011	March 25, 2012	November 1, 2012	March 7, 2013
November 23, 2011	March 27, 2012	November 3, 2012	March 20, 2013
November 24, 2011	March 28, 2012	November 9, 2012	March 21, 2013
November 25, 2011	March 29, 2012	November 10, 2012	March 27, 2013
December 15, 2011	March 30, 2012	November 20, 2012	March 31, 2013
December 26, 2011	March 31, 2012	November 21, 2012	April 1, 2013
December 28, 2011	April 1, 2012	November 28, 2012	April 4, 2013
December 29, 2011	April 2, 2012	November 29, 2012	April 5, 2013
December 30, 2011	April 4, 2012	November 30, 2012	April 6, 2013
December 31, 2011	April 5, 2012	December 1, 2012	April 7, 2013
January 5, 2012	April 9, 2012	December 2, 2012	April 8, 2013
May 7, 2013	February 18, 2014	October 21, 2014	March 21, 2015
May 16, 2013	February 19, 2014	October 23, 2014	March 22, 2015

* Dates gathered from publicly available rain and weather data collected at stations located near the Facility.

ATTACHMENT A**Notice of Intent to File Suit, Kernen Construction**
Significant Rain Events,* 5/13/2011 – 5/13/2016

May 17, 2013	February 27, 2014	October 24, 2014	March 28, 2015
May 22, 2013	February 28, 2014	October 25, 2014	March 31, 2015
May 26, 2013	March 1, 2014	October 26, 2014	April 6, 2015
May 27, 2013	March 2, 2014	October 31, 2014	April 7, 2015
May 28, 2013	March 3, 2014	November 7, 2014	April 14, 2015
May 29, 2013	March 4, 2014	November 13, 2014	June 2, 2015
May 30, 2013	March 5, 2014	November 15, 2014	July 9, 2015
June 19, 2013	March 6, 2014	November 20, 2014	July 10, 2015
June 24, 2013	March 9, 2014	November 21, 2014	August 29, 2015
June 26, 2013	March 10, 2014	November 22, 2014	September 17, 2015
September 17, 2013	March 17, 2014	November 29, 2014	September 18, 2015
September 18, 2013	March 25, 2014	December 1, 2014	October 17, 2015
September 21, 2013	March 26, 2014	December 3, 2014	October 26, 2015
September 22, 2013	March 27, 2014	December 4, 2014	October 28, 2015
September 23, 2013	March 28, 2014	December 6, 2014	November 1, 2015
September 25, 2013	March 29, 2014	December 8, 2014	November 2, 2015
September 29, 2013	March 31, 2014	December 11, 2014	November 8, 2015
September 30, 2013	April 1, 2014	December 12, 2014	November 9, 2015
November 3, 2013	April 20, 2014	December 13, 2014	November 10, 2015
November 8, 2013	April 22, 2014	December 16, 2014	November 15, 2015
November 12, 2013	April 23, 2014	December 17, 2014	November 16, 2015
November 13, 2013	April 24, 2014	December 18, 2014	November 17, 2015
November 19, 2013	April 25, 2014	December 19, 2014	November 18, 2015
November 20, 2013	April 27, 2014	December 20, 2014	November 20, 2015
December 3, 2013	May 5, 2014	December 21, 2014	November 24, 2015
December 7, 2013	May 9, 2014	December 22, 2014	November 25, 2015
January 8, 2014	May 10, 2014	December 25, 2014	December 2, 2015
January 9, 2014	May 18, 2014	December 30, 2014	December 3, 2015
January 10, 2014	May 19, 2014	January 16, 2015	December 4, 2015
January 11, 2014	May 20, 2014	January 18, 2015	December 6, 2015
January 12, 2014	June 25, 2014	February 2, 2015	December 9, 2015
January 29, 2014	June 26, 2014	February 3, 2015	December 10, 2015
January 30, 2014	June 27, 2014	February 5, 2015	December 11, 2015
February 7, 2014	June 28, 2014	February 6, 2015	December 12, 2015
February 8, 2014	September 18, 2014	February 7, 2015	December 13, 2015
February 9, 2014	September 24, 2014	February 9, 2015	December 14, 2015
February 10, 2014	September 25, 2014	February 10, 2015	December 17, 2015
February 13, 2014	September 26, 2014	February 27, 2015	December 18, 2015
February 14, 2014	October 15, 2014	February 28, 2015	December 22, 2015
February 15, 2014	October 18, 2014	March 12, 2015	December 23, 2015
February 16, 2014	October 20, 2014	March 16, 2015	December 24, 2015
December 19, 2015	March 10, 2016	March 23, 2015	December 25, 2015
December 20, 2015	March 12, 2016	March 24, 2015	December 28, 2015
December 21, 2015	March 13, 2016	March 25, 2015	December 30, 2015

* Dates gathered from publicly available rain and weather data collected at stations located near the Facility.

ATTACHMENT A

Notice of Intent to File Suit, Kernen Construction
Significant Rain Events,* 5/13/2011 – 5/13/2016

January 5, 2016	March 27, 2016
January 6, 2016	April 4, 2016
January 8, 2016	April 9, 2016
January 9, 2016	April 14, 2016
January 10, 2016	April 15, 2016
January 12, 2016	April 22, 2016
January 13, 2016	April 23, 2016
January 14, 2016	April 24, 2016
January 15, 2016	April 27, 2016
January 16, 2016	April 28, 2016
January 17, 2016	
January 18, 2016	
January 19, 2016	
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February 27, 2016	
February 29, 2016	
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March 3, 2016	
March 5, 2016	
March 6, 2016	
March 7, 2016	
March 9, 2016	
March 14, 2016	
March 15, 2016	
March 20, 2016	
March 21, 2016	
March 22, 2016	
March 23, 2016	

* Dates gathered from publicly available rain and weather data collected at stations located near the Facility.